APPENDIX A

Order on Mandate of the Supreme Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

66 Civ. 3413

OSCAR GRUSS & SON,

Plaintiff,

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

Defendants.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY FIRST MORTGAGE 4% BONDHOLDERS COMMITTEE,

Intervening Plaintiff,

THE NEW YORK CENTRAL RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, and RICHARD JOYCE SMITH and WILLIAM J. KIRK, TRUSTEES OF THE PROPERTY OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR,

Intervening Defendants.

On May 8, 1967, the Supreme Court of the United States vacated the order of this Court dated November 28, 1966 which had dismissed the complaint herein, and remanded the case to this Court. The Supreme Court observed that since the order of the Interstate Commerce Commission approving the merger of The New York Central Railroad Company and The Pennsylvania Railroad Company, which plaintiff's suit attacks, was then subject to further consideration by the Commission pursuant to the Supreme

Court's mandate in *Baltimore and Ohio R. Co.* v. *United States,* 386 U.S. 372, and since proceedings to achieve inclusion of the New Haven are under way, it then appeared inappropriate to review this Court's decision. Instead, it stated that plaintiff may attempt a fresh challenge in this Court, should it be dissatisfied with the ultimate order of the Commission in the merger proceedings.

On June 12, 1967, the Interstate Commerce Commission served its Supplemental Report of June 9, 1967 in Finance Docket No. 21989, Pennsylvania Railroad Company—Merger—New York Central Railroad Company, 330 I.C.C. 328, authorizing consummation of the merger transaction 35 days after the service of that Report. Therefore,

IT IS ORDERED by the Court that the complaint in this action be dismissed by the Clerk without prejudice on July 10, 1967, unless plaintiff filed on or before that date a supplemental complaint which attempts to challenge the several orders of the Commission authorizing the merger.

/s/ HENRY J. FRIENDLY
HENRY J. FRIENDLY
United States Circuit Judge

/s/ RICHARD H. LEVET
RICHARD H. LEVET
Senior United States
District Judge

/s/ EDWARD WEINFELD
EDWARD WEINFELD
United States District Judge

June 21, 1967

APPENDIX B

Title 28 U.S.C., the Judicial Code

§ 1398. Interstate Commerce Commission's orders

(a) Except as otherwise provided by law, any civil action to enforce, suspend or set aside in whole or in part an order of the Interstate Commerce Commission shall be brought only in the judicial district wherein is the residence or principal office of any of the parties bringing such action.

(b) A civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, an order of the Interstate Commerce Commission made pursuant to the referral of a question or issue by a district court or by the Court of Claims, shall be brought only in the court which referred the question or issue. As amended Aug. 30, 1964, Pub.L. 88-513, § 2, 78 Stat. 695.

Administrative Procedure Act

§ 5(b), 5 U.S.C. § 1004(b)

Procedure

(b) The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the

parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 1006 and 1007 of this title.

§ 7(c), 5 U.S.C. § 1006(c)

Hearings; presiding officers; powers and duties; burden of proof; evidence; record as basis for decision

In hearings which section 1003 or 1004 of this title requires to be conducted pursuant to this section—

• • • •

(c) Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for moneys or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

Appendix B

§ 8(b), 5 U.S.C. § 1007(b)

Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

In cases in which a hearing is required to be conducted in conformity with section 1006 of this title—

* * * *

(b) Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

§ 10, 5 U.S.C. § 1009

Judicial review of agency action

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

Appendix B

Rights of review

(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

Form and venue of proceedings

(b) The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

Acts reviewable

(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

Appendix B

Relief pending review

(d) Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

Scope of review

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determina-

tions the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

Bankruptcy Act

§ 77(b)(c)(d)(e)(f)

(b) A plan of reorganization within the meaning of this section (1) shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise; (2) may include provisions modifying or altering the rights of stockholders generally, or of any class of them, either through the issuance of new securities of any character, or otherwise; (3) may include, for the purpose of preserving such interests of creditors and stockholders as are not otherwise provided for, provisions for the issuance to any such creditor or stockholder of options or warrants to receive, or to subscribe for, securities of the reorganized company in such amounts and upon such terms and conditions as may be set forth in the plan; (4) shall provide for fixed charges (including fixed interest on funded debt, interest on unfunded debt, amortization of discount on funded debt, and rent for leased railroads) in such an amount that, after due consideration of the probable prospective earnings of the property in light of its earnings experience and all other relevant facts, there shall be adequate coverage of such fixed charges by the probable earnings available for the payment thereof; (5) shall provide adequate means for the execution of the plan, which may include the transfer of any interest in or control of all or any part of the property of the debtor to another corporation or corporations, the merger or consolidation of the debtor with

another corporation or corporations, the retention of all or any part of the property by the debtor, the sale of all or any part of the property of the debtor either subject to or free from any lien at not less than a fair upset price, the distribution of all or any assets, or the proceeds derived from the sale thereof, among those having an interest therein, the satisfaction or modification of any liens, indentures, or other similar interests, the curing or waiver of defaults, the extension of maturity dates of outstanding securities, the reduction in principal and/or rate of interest and alteration of other terms of such securities, the amendment of the charter of the debtor, and/or the issuance of securities of either the debtor or any such other corporation or corporations for cash, or in exchange for existing securities, or in satisfaction of claims or rights or for other appropriate purposes; and may deal with all or any part of the property of the debtor; may reject contracts of the debtor which are executory in whole or in part, including unexpired leases; and may include any other appropriate provisions not inconsistent with this section.

The adoption of an executory contract or unexpired lease by the trustee or trustees of a debtor shall not preclude a rejection of such contract or lease in a plan of reorganization approved hereunder, and any claim resulting from such rejection shall not have priority over any other claims against the debtor because such contract or lease had been previously adopted. The term "securities" shall include evidences of indebtedness either secured or unsecured, bonds, stock, certificates of beneficial interest therein, certificates of beneficial interest in property, options, and warrants to receive, or to subscribe for, securities. The term "stockholders" shall include the holders of voting-trust certificates. The term "creditors" shall include, for all purposes of this section all holders

of claims of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this Act, including the holder of a claim under a contract executory in whole or in part including an unexpired lease.

The term "claims" includes debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character. For all purposes of this section unsecured claims, which would have been entitled to priority if a receiver in equity of the property of the debtor had been appointed by a Federal court on the day of the approval of the petition, shall be entitled to such priority and the holders of such claims shall be treated as a separate class or classes of creditors. In case an executory contract or unexpired lease of property shall be rejected, or shall not have been adopted by a trustee appointed under this section, or shall have been rejected by a receiver in equity in a proceeding pending prior to the institution of a proceeding under this section, or shall be rejected by any plan, any person injured by such nonadoption or rejection shall for all purposes of this section be deemed to be a creditor of the debtor to the extent of the actual damage or injury determined in accordance with principles obtaining in equity proceedings. The provisions of section 60 of this Act shall apply to a proceeding under this section. For all purposes of this section any creditor or stockholder may act in person or by an attorney at law or by a duly authorized agent or committee subject to the provisions of subsection (p) hereof. The running of all statutes of limitation shall be suspended during the pendency of a proceeding under this section.

(c) After approving the petition:

(1) The judge shall forthwith (and in pending proceedings immediately upon the effective date of this amendatory section [Aug. 27, 1935]) require the debtor to give such notice as the order may direct to the mortgage trustees, creditors and stockholders, and to cause publication thereof for such period and in such newspapers as the judge may direct, of a hearing to be held not later than thirty days after the date of such order, at which hearing or any adjournment thereof the judge shall appoint one or more trustees of the debtor's property. Such appointments shall become effective upon ratification thereof by the Commission without a hearing, unless the Commission shall deem a hearing necessary. Where a trustee is appointed who within one year prior thereto has been an officer, director, or employee of the debtor corporation, any subsidiary corporation, or any holding company connected therewith, the judge, subject to ratification by the Commission as herein provided, shall appoint another trustee or trustees who shall not have had any such affiliations: *Provided,* That the appointment of such additional trustee or trustees shall not be required for a debtor the annual operating revenues of which were less than $1,000,000 for the previous calendar year.

(2) The judge shall fix the amount of the bond of every trustee. He may thereafter terminate any such appointments on cause shown, and may in that event and in the event of a vacancy from any other cause, in the manner and within the qualifications herein provided for the appointment of trustees, appoint a substitute trustee or trustees, and in the same manner and within the same qualifications may appoint an additional trustee, and shall fix the amount of the bond of every substitute or additional trustee or trustees. The judge shall in his discretion con-

firm the appointment of such legal counsel for the trustees as they shall select, with power of removal. The trustee or trustees and their counsel shall receive only such compensation from the estate of the debtor as the judge may from time to time allow within such maximum limits as may be approved by the Commission as reasonable. The trustee or trustees so appointed, upon filing such bond, shall have all the title and shall exercise, subject to the control of the judge and consistently with the provisions of this section, all of the powers of a trustee appointed pursuant to section 44 of this Act or any other section of this Act, and, to the extent not inconsistent with this section, if authorized by the judge, the powers of a receiver in an equity proceeding, and, subject to the control of the judge and the jurisdiction of the Commission as provided by the Interstate Commerce Act as now or hereafter amended, the power to operate the business of the debtor. In operating the business of the debtor with respect to safety, location of tracks, and terminal facilities, the trustee or trustees shall be subject to lawful orders of State regulatory bodies of statewide jurisdiction to the same extent as would the debtor if a petition respecting it had not been filed under subsection (a) of this section except that (A) any such order which would require the expenditure, or the incurring of an obligation for the expenditure, of money from the debtor's estate shall not become effective (a) unless the trustee or trustees, with the approval of the court, shall consent thereto, or (b) unless the Commission, upon appropriate application or applications by an interested party or interested parties, shall find that compliance with the order will not impair the ability of the trustee or trustees to perform his or their duties to the public, will not constitute an undue burden upon interstate commerce, will be compatible with the public interest, and will not interfere with the formulation and approval of a

satisfactory plan of reorganization for the debtor, and (B) compliance shall be made with any applicable provision of the Interstate Commerce Act. Prior to the appointment of a trustee, the debtor on behalf of the court shall continue in the possession of the property and shall operate the business thereof during such period, and shall have all the title to the property and shall exercise all power consistent with the provisions of this section, subject at all times to the control of the judge, and to such limitations, restrictions, terms, and conditions as he may from time to time impose and prescribe.

(3) The judge may, upon not less than fifteen days' notice publish in such manner and in such newspapers as the judge may in his discretion determine, which notice so determined shall be sufficient, for cause shown, and with the approval of the Commission, in accordance with section 20 (a) of the Interstate Commerce Act, as now or hereafter amended, authorize the trustee or trustees to issue certificates for cash, property, or other consideration approved by the judge, for such lawful purposes and upon such terms and conditions and with such security and such priority in payments over existing obligations, secured or unsecured, or receivership charges, as might in an equity receivership be lawful. Where such certificates are authorized to provide funds to pay for the acquisition, assembly or installation of safety equipment or materials related thereto, or for the purpose of reimbursing the trustee or trustees, for funds so expended, the judge may direct (without limitation of his power to make such direction in the absence of this provision) that the certificates shall have such lien on the property of the debtor and shall be entitled to such priority in payments over existing obligations, secured or unsecured, and receivership charges and present or future duties,

debts or taxes or other obligations in favor of or payable to any State or any subdivision, agency or instrumentality thereof and interest or penalties, and to such parity with all or any portion of the other costs or expenses of administration or operation as in the particular case the judge may find equitable at the time of authorizing the issuance of such certificates, regardless of whether such obligations, charges, costs or expenses, duties, debts, or taxes constitute or are secured by liens on real or personal property or shall have become payable before or after the issuance of such certificates.

(4) The judge shall require the officers of the debtor or the trustee or trustees, at such time or times as the judge may direct, and in lieu of the schedules required by section 7 of this Act, to file with the court such schedules and submit such other information as may be necessary to disclose the conduct of the debtor's affairs and the fairness of any proposed plan; and shall direct the officers of the debtor, or the trustee or trustees, within such time as the judge shall set, to prepare and file with the court a list of all known bondholders and creditors of the debtor, and the amounts and character of their debts, claims, and securities, and the last known post-office address or place of business of each bondholder and creditor, and a list of all known stockholders of the debtor, with the last known post-office address or place of business of each, which lists the judge may require to be brought down to date at any time. The contents of such lists shall not constitute admissions by the debtor or the trustees in a proceeding under this section or otherwise.

(5) It shall be the duty of anyone having information as to the names and addresses of the holders of any securities of the debtor to divulge such information to

the trustee or trustees, upon written request therefor and, upon petition by any party in interest, and after hearing, the judge may order the production of any such information by anyone having and refusing to divulge it to any trustee, upon written request therefor. The judge may direct that the cost of preparing such information shall be borne by the debtor's estate.

(6) If a lease of a line of railroad is rejected, and if the lessee, with the approval of the judge, shall elect no longer to operate the leased line, it shall be the duty of the lessor at the end of a period to be fixed by the judge to begin the operation of such line, unless the judge, upon the petition of the lessor, shall decree after hearing that it would be impracticable and contrary to the public interest for the lessor to operate the said line, in which event it shall be the duty of the lessee to continue operation on or for the account of the lessor until the abandonment of such line is authorized in accordance with the provisions of section 1 of the Interstate Commerce Act as amended, or until such operation pursuant to this paragraph is otherwise lawfully terminated. During any such operation, the lessor shall be deemed to be a carrier subject to all applicable provisions of the Interstate Commerce Act, as amended, and shall be entitled to receive just, reasonable, and equitable divisions of rates, fares, or charges applicable to the transportation of persons or property over its line or lines of railroad and the lines of the lessee or other carriers, and the provisions of section 15(6) of the Interstate Commerce Act, as now or hereafter amended, shall apply to said divisions whether or not joint rates covering such transportation have been established.

(7) The judge shall promptly determine and fix a rea-

sonable time within which the claims of creditors may be filed or evidenced and after which no claim not so filed or evidenced may participate except on order for cause shown, the manner in which such claims may be filed or evidenced and allowed, and for the purposes of the plan and its acceptance, after notice and hearing, the division of creditors and stockholders into classes according to the nature of their respective claims and interests. Such division shall not provide for separate classifications unless there be substantial differences in priorities, claims, or interests. The trustee or trustees under any mortgage, deed of trust, or indenture outstanding against the property may, within the time prescribed, file a verified claim in behalf of all bonds or securities outstanding under such mortgage, deed of trust, or indenture, in which event it shall be unnecessary for the holders of such bonds or securities to file claims in their own behalf, but nothing herein shall constitute such trustee or trustees the representative or representatives of such holders for the purpose of accepting or rejecting any plan of reorganization.

(8) The judge shall cause reasonable notice of the period in which claims may be filed, of hearings on application for the dismissal of the proceedings, or for the final allowance of fees or expenses to be given creditors and stockholders by publication or otherwise.

(9) The judge shall direct the trustee or trustees, and may request the Commission through such of its agencies as it may designate, to report to him any facts pertaining to irregularities, fraud, misconduct, or mismanagement, as a consequence of which the debtor may have a cause of action arising therefrom against any person or corporation.

Appendix B

(10) The judge may direct the debtor or the trustee or trustees to keep such records and accounts, in addition to the accounts prescribed by the Commission, as will permit of such a segregation and allocation, as the necessities of the case may require, of the earnings and expenses between and to the divisions and parts of the railroad or other property of the debtor which are separately subject to the liens of the various mortgages or deeds of trust, or are separately subject to lease, and may refer to the Commission for its recommendations after hearings thereon if the parties shall so request and/or the Commission determine necessary or desirable, as to the method or formula by which such segregation and allocation shall be made; and thereafter such segregation and allocation may be made at the expense of the debtor's estate.

(11) The Commission may direct such of its agencies as it may designate to file in the proceedings before the Commission a report, and additional or supplemental reports at such time or times as the Commission shall designate, of such data with reference to the property, business, earnings, and corporate organization of the debtor and such other facts as the Commission, after hearing if it deems necessary, shall determine to be necessary or helpful information for the purposes of the preparation of reorganization plans, and for the purpose of aiding in determining the method or formula of allocating earnings permitted by subdivision (10) of this subsection (c). Such report or reports shall be prima facie evidence of the facts therein stated in any proceeding under this section. The actual cost of preparing said report or reports shall be certified by the Commission and shall be borne by the debtor's estate.

(12) Within such maximum limits as are fixed by the Commission, the judge may make an allowance, to be paid

out of the debtor's estate, for the actual and reasonable expenses (including reasonable attorney's fees) incurred in connection with the proceedings and plan by the parties in interest and by reorganization managers and committees or other representatives of creditors and stockholders, and within such limits may make an allowance to be paid out of the debtor's estate for the actual and reasonable expenses incurred in connection with the proceedings and plan and reasonable compensation for services in connection therewith by trustees under indentures, depositaries and such assistants as the Commission with the approval of the judge may especially employ. Appeal from orders of the court fixing such allowances may be taken to the circuit court of appeals independently of other appeals in the proceeding and shall be heard summarily. The Commission shall, at such time or times as it may deem appropriate, after hearing, fix the maximum allowances which may be allowed by the court pursuant to the provisions of paragraph (12) of this subsection (c) and, after hearing if the Commission shall deem it necessary, the maximum compensation which may be allowed by the court pursuant to the provisions of paragraph (2) of this subsection (c).

(13) The judge may on his own motion or at the request of the Commission refer any matters for consideration and report, either generally or upon specified issues, to one of several special masters who shall have been previously designated to act as special masters in any proceedings under this section by order of any court of appeals and may allow such master a reasonable compensation for his services and actual and reasonable expenses. The court of appeals of each circuit shall designate three or more members of the bar as such special masters whom they deem qualified for such services, and shall from time to time revise such designations by changing the persons

designated or their number, as the public interest may require: *Provided, however,* That there shall always be three of such special masters qualified for appointment in each circuit who shall hear any matter referred to them under this section by a judge of any district court. The debtor, any creditor or stockholder, or the duly authorized committee, attorney or agent of either or the trustee or trustees of any mortgage, deed of trust or indenture pursuant to which securities of the debtor are outstanding, shall have the right to be heard on all questions arising in the proceedings, and upon petition therefor and cause shown, any such person or any other interested party may be permitted to intervene. The judge may, after hearing, make reasonable rules defining the matters upon which notice shall be given to other than intervenors and the manner of giving such notice.

(d) The debtor, after a petition is filed as provided in subsection (a), shall file a plan of reorganization within six months of the entry of the order by the judge approving the petition as properly filed, or if heretofore approved, then within six months of the effective date of this Act, and not thereafter unless such time is extended by the judge from time to time for cause shown, no single extension at any one time to be for more than six months. Such plan shall also be filed with the Commission at the same time. Such plans may likewise be filed at any time before, or with the consent of the Commission during, the hearings hereinafter provided for, by the trustee or trustees, or by or on behalf of the creditors being not less than 10 per centum in amount of any class of creditors, or by or on behalf of any class of stockholders being not less than 10 per centum in amount of any such class, or with the consent of the Commission by any party in interest. After the filing of such a plan, the Commission, unless such plan

shall be considered by it to be prima facie impracticable, shall, after due notice to all stockholders and creditors given in such manner as it shall determine, hold public hearings, at which opportunity shall be given to any interested party, to be heard, and following which the Commission shall render a report and order in which it shall approve a plan, which may be different from any which has been proposed, that will in its opinion meet with the requirements of subsections (b) and (e) of this section, and will be compatible with the public interest; or it shall render a report and order in which it shall refuse to approve any plan. In such report the Commission shall state fully the reasons for its conclusions.

The Commission may thereafter, upon petition for good cause shown filed within sixty days of the date of its order, and upon further hearings if the Commission shall deem necessary, in a supplemental report and order modify any plan which it has approved, stating the reasons for such modification. The Commission, if it approves a plan, shall thereupon certify the plan to the court together with a transcript of the proceedings before it and a copy of the report and order approving the plan. No plan shall be approved or confirmed by the judge in any proceeding under this section unless the plan shall first have been approved by the Commission and certified to the court.

(e) Upon the certification of a plan by the Commission to the court, the court shall give due notice to all parties in interest of the time within which such parties may file with the court their objections to such plan, and such parties shall file, within such time as may be fixed in said notice, detailed and specific objections in writing to the plan and their claims for equitable treatment. The judge shall, after notice in such manner as he may determine to

the debtor, its trustee or trustees, stockholders, creditors, and the Commission, hear all parties in interest in support of, and in opposition to, such objections to the plan and such claims for equitable treatment. After such hearing, and without any hearing if no objections are filed, the judge shall approve the plan if satisfied that: (1) It complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; (2) the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed so far as they can be ascertained at the date of such hearing, are reasonable, are within such maximum limits as are fixed by the Commission, and are within such maximum limits to be subject to the approval of the judge; (3) the plan provides for the payment of all costs of administration and all other allowances made or to be made by the judge, except that allowances provided for in subsection (c), paragraph (12) of this section, may be paid in securities provided for in the plan if those entitled thereto will accept such payment, and the judge is hereby given power to approve the same.

If the judge shall not approve the plan, he shall file an opinion, stating his conclusions and the reason therefor, and he shall enter an order in which he may either dismiss the proceedings, or in his discretion and on motion of any party in interest refer the proceedings back to the Commission for further action, in which event he shall

transmit to the Commission a copy of any evidence received. If the proceedings are referred back to the Commission, it shall proceed to a reconsideration of the proceedings under the provisions of subsection (d) hereof. If the judge shall approve the plan, he shall file an opinion, stating his conclusions and the reasons therefor, and enter an order to that effect, and shall send a certified copy of such opinion and order to the Commission. The plan shall then be submitted by the Commission to the creditors of each class whose claims have been filed and allowed in accordance with the requirements of subsection (c) hereof, and to the stockholders of each class, and/or to the committees or other representatives thereof, for acceptance or rejection, within such time as the Commission shall specify, together with the report or reports of the Commission thereon or such a summarization thereof as the Commission may approve, and the opinion and order of the judge: *Provided*, That submission to any class of stockholders shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, (a) that at the time of the finding the corporation is insolvent, or that at the time of the finding the equity of such class of stockholders has no value, or that the plan provides for the payment in cash to such class of stockholders of an amount not less than the value of their equity, if any, or (b) that the interests of such class of stockholders will not be adversely and materially affected by the plan, or (c) that the debtor has pursuant to authorized corporate action acepted the plan and its stockholders are bound by such acceptance: *Provided further*, That submission to any class of creditors shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, that the interests of such class of creditors will not be adversely and

materially affected by the plan, or that at the time of the finding the interests of such class of creditors have no value, or that the plan provides for the payment in cash to such class of creditors of an amount not less than the value of their interests. For the purpose of this section the acceptance or rejection by any creditor or stockholder shall be in writing, executed by him or by his duly authorized attorney, committee, or representative. If the United States of America, or any agency thereof, or any corporation (other than the Reconstruction Finance Corporation) the majority of the stock of which is owned by the United States of America, is a creditor or stockholder, the interests or claims thereof shall be deemed to be affected by the plan, and the President of the United States, or any officer or agency he may designate, is hereby authorized to act in respect of the interests or claims of the United States or of such agency or other corporation. The expense of such submission shall be certified by the Commission and shall be borne by the debtor's estate. The Commission shall certify to the judge the results of such submission.

Upon receipt of such certification, the judge shall confirm the plan if satisfied that it has been accepted by or on behalf of creditors of each class to which submission is required under this subsection holding more than two-thirds in amount of the total of the allowed claims of such class which have been reported in said submission as voting on said plan, and by or on behalf of stockholders of each class to which submission is required under this subsection holding more than two-thirds of the stock of such class which has been reported in said submission as voting on said plan; and that such acceptances have not been made or procured by any means forbidden by law: *Provided*, That, if the plan has not been so accepted by the

creditors and stockholders, the judge may nevertheless confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it; that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e). *Provided further,* That if, in any reorganization proceeding under this section, the United States is a creditor on claims for taxes or customs duties (whether or not the United States has any other interest in, or claim against, the debtor, as creditor or stockholder), no plan which does not provide for the payment thereof shall be confirmed by the judge except upon the acceptance, certified to the court, of a lesser amount by the President of the United States or the officer or agency designated by him pursuant to the provisions of the preceding paragraph hereof: *Provided further,* That if the President of the United States or such officer or agency shall fail to accept or reject such lesser amount for more than ninety days after receipt of written notice so to do from the court, accompanied by a certified copy of the plan, the consent of the United States insofar as its claims for taxes or customs duties are concerned shall be conclusively presumed. If the judge shall confirm the plan, he shall enter an order and file an opinion with a statement of his conclusions and his reasons therefor. If the judge shall not confirm the plan, he shall file an opinion, with a statement of his conclusions and his reasons therefor, and enter an order in which he shall either dismiss the proceedings, or, in his discretion and on the motion of any party in interest, refer the case back to the Commission for further proceedings, including the consideration

of modifications of the plan or the proposal of new plans. In the event of such a reference back to the Commission, the proceedings with respect to any modified or new plan shall be governed by the provisions of this section in like manner as in an original proceeding hereunder.

If it shall be necessary to determine the value of any property for any purpose under this section, the Commission shall determine such value and certify the same to the court in its report on the plan. The value of any property used in railroad operation shall be determined on a basis which will give due consideration to the earning power of the property, past, present, and prospective, and all other relevant facts. In determining such value only such effect shall be given to the present cost of reproduction new and less depreciation and original cost of the property, and the actual investment therein, as may be required under the law of the land, in light of its earning power and all other relevant facts.

(f) Upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall, subject to the right of judicial review, be binding upon the debtor, all stockholders thereof, including those who have not, as well as those who have, accepted it, and all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it. Upon confirmation of the plan, the debtor and any other corporation or corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the judge relative thereto, under and subject to the supervision and the control of the judge, the laws of any State or the decision or

order of any State authority to the contrary notwithstanding. The property dealt with by the plan, when transferred and coveyed to the debtor or to the other corporation or corporations provided for by the plan, or when retained by the debtor pursuant to the plan, shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan or directing such transfer and conveyance or retention, and the judge may require the trustee or trustees appointed hereunder, the debtor, any mortgagee, the trustee of any obligation of the debtor, and all other proper and necessary parties, to make any such transfer or conveyance, and may require the debtor to join in any such transfer or conveyance made by the trustee or trustees. Upon the termination of the proceedings a final decree shall be entered discharging the trustee or trustees, and making such provisions as may be equitable, by way of injunction or otherwise, and closing the case. Upon confirmation of a plan the Commission shall, without further proceedings, grant authority for the issue of any securities, assumption of obligations, transfer of any property, sale, consolidation or merger of the debtor's property, or pooling of traffic, to the extent contemplated by the plan and not inconsistent with the provisions and purposes of the Interstate Commerce Act as now or hereafter amended. The provisions of title I and of section 5 of the Securities Act of 1933, as amended, shall not apply to the issuance, sale, or exchange of any of the following securities, which securities and transactions therein shall, for the purposes of said Securities Act, be treated as if they were specifically mentioned in sections 3 and 4 of the said Securities Act, respectively: (1) All securities

issued pursuant to any plan of reorganization confirmed by the judge in accordance with the provisions of this section; (2) all securities issued pursuant to such plan for the purpose of raising money for working capital and other purposes of such plan; (3) all securities issued by the debtor or by the trustee or trustees pursuant to subdivision (c), clause (3) of this section; (4) all certificates of deposit representing securities of, or claims against, the debtor, with the exception of such certificates of deposit as are issued by committees not subject to subsection (p) hereof. The provisions of subdivision (a) of section (14) of the Securities Exchange Act of 1934 shall not be applicable with respect to any action or matter which is within the provisions of subsection (p) hereof.

APPENDIX C

Order on Mandate of the Supreme Court Proposed by Gruss

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

66 Civ. 3413

OSCAR GRUSS & SON,

Plaintiff,

—against—

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY FIRST MORTGAGE 4% BONDHOLDERS COMMITTEE,

Intervening Plaintiff,

THE NEW YORK CENTRAL RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, and RICHARD JOYCE SMITH and WILLIAM J. KIRK, TRUSTEES OF THE PROPERTY OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR,

Intervening Defendants.

On May 8, 1967, the Supreme Court of the United States vacated the Order of this Court dated November 28, 1966, which had dismissed the complaint herein, and remanded the case to this Court for further proceedings in conformity with the opinion of the Supreme Court. The per

curiam opinion of the Supreme Court notes that the Order of the Interstate Commerce Commission in the Penn-Central merger proceedings, which plaintiff's suit attacked, is now subject to further consideration by the Commission, and states that plaintiff may attempt a fresh challenge in this Court, should plaintiff be dissatisfied with the ultimate order of the Commission in the merger proceedings. Accordingly,

IT IS ORDERED that:

(1) The Order of this Court entered on November 28, 1966, dismissing the complaint herein, is vacated.

(2) The cause is remanded to the Interstate Commerce Commission for further proceedings not inconsistent with the Supreme Court's per curiam opinion of May 8, 1967.

(3) This Court reserves jurisdiction to consider any challenge by plaintiff to the ultimate order of the Commission in the Penn-Central merger proceedings.

.....

HENRY J. FRIENDLY
United States Circuit Judge

.....

EDWARD WEINFELD
United States District Judge

.....

RICHARD H. LEVET
Senior U. S. District Judge

APPENDIX D

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

In Proceedings for the Reorganization of a Railroad

In the Matter of THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Debtor.	No. 30226

ANSWER OF OSCAR GRUSS & SON TO PETITION OF THE TRUSTEES FOR ORDER NO. 441

Oscar Gruss & Son ("Gruss") respectfully represents:

1. The Trustees of the property of The New York, New Haven and Hartford Railroad Company, Debtor, filed herein a Report on the Status of the Reorganization and Petition for Instructions As to Their Future Course of Action dated April 5, 1967. A hearing on the Petition was commenced on May 1, 1967, and continued to June 19, 1967. By Order of this Court dated May 25, 1967, the hearing was further continued without date, subject to such future order as the Court may enter on June 19, 1967.

2. For reasons stated below, Gruss requests that the Trustees be instructed to use their best efforts, in negotiating with The Pennsylvania Railroad Company ("Penn") and The New York Central Railroad Company ("Central"), and in proceedings before the Interstate Commerce Commission ("Commis-

sion"), (a) to see that the operations of the New Haven are included with those of Penn and Central at the time of and as a condition precedent to the merger of Penn and Central, and (b) to see that, upon any sale of properties of the New Haven to Penn-Central, the price and terms be as favorable as possible to the New Haven estate and its creditors.

3. In June 1964 the Trustees took the position, before the Commission, that inclusion of the New Haven in the merged Penn-Central should be required by the Commission as a condition precedent to consummation of the merger. Thereafter they conducted negotiations with Penn and Central that resulted in a memorandum of understanding signed on February 5, 1965, and announced on April 7, 1965, and in an "Agreement" dated April 21, 1966, and amended on October 4, 1966. Neither the memorandum nor the "Agreement" was ever submitted for the approval of, or approved by, this Court.

4. In Section 11.7 of the "Agreement", the Trustees limit the statements, stipulations, or other documents to be filed in the Penn-Central merger proceedings, or any judicial review thereof, to documents not inconsistent with the provisions and intent of the "Agreement". In Section 30.4 of the "Agreement," the Trustees affirm that they have a material obligation to use their best efforts, as trustees, to effect consummation of the transactions contemplated thereby.

5. Gruss further requests that, to the extent that compliance with the instructions specified in Paragraph 2 are inconsistent with their "Agreement" dated April 21, 1966, and particularly with the provisions of Sections 11.7 and 30.4 of that document, the Trustees be instructed that such provisions are of no force and effect, and should be disaffirmed.

6. These provisions of the "Agreement" have created a conflict of interest between the fiduciary duties of the Trustees to the New Haven estate and to the creditors of the New Haven on the one hand, and the obligations that they assumed to Penn and Central. Annexed hereto as Exhibit A is a copy of a letter

tional plan of reorganization for the New Haven. We are not as impressed as the Trustees with the difficulties in preparing such a plan, at least under the slower time-table that must now be contemplated. The time required to be spent in preparing an orthodox plan would hardly equal that needed to defend an unorthodox one, not to speak of the latter's hazard of failure at the end of a long period of judicial review. * * * A complete plan would permit a vote to be taken, surely a desirable thing even if, as we rather doubt, the Trustees are right in saying it is not requisite, without precluding a cram-down in the event the needed merger is not obtained and the court finds the facts warrant such action."

11. Heeding, as they say, the admonitions of the Court of Appeals, the Trustees filed with the Commission on June 12, 1967, a supplement to their requested findings and brief, stating that they will no longer press for approval of their "plan" in its present two-step form, and that they will in reasonable course file an amendment setting forth their proposals as to the treatment of all claimants in the estate.

12. Another basic factor is the continued worsening of the financial position of the estate through continued losses substantially exceeding the 1966 deficit, and an accelerating decline in an already precarious cash position. The Committee for the Holders of the Debtor's First and Refunding Mortgage Bonds has pending before this Court a cross-petition for termination of the reorganization proceedings and liquidation of the railroad, which other bondholder representatives may have to support and which the Court may be compelled to grant absent a prompt end to the draining away of estate assets and the accumulation of prior claims. There is no practical alternative to liquidation short of prompt inclusion in a merged Penn-Central, long before there can be a final determination of the issues in the inclusion proceedings.

13. At the oral argument held before the Commission on June 15, 1967, the States of Connecticut, New York, Rhode Island and

Massachusetts all took the position that the Commission should require inclusion on the New Haven operations in the merged Penn-Central, at the time that the merger is consummated. The same basic position was asserted by Manufacturers Hanover Trust Company, as Trustee under the first and refunding mortgage, and by Gruss. Gruss specifically urged that the Commission consider the matter promptly and require simultaneous inclusion of the New Haven as a condition precedent to consummation of the merger.

14. It is clear that simultaneous inclusion of the New Haven at the time of and as a condition precedent to the Penn-Central merger would be in the best interests of the New Haven estate and its creditors. At long last such simultaneous inclusion would bring to an end the enforced subsidy of the New Haven's operations by the creditors that has been going on since the inception of the reorganiation proceedings and the entry of an injunction prohibiting foreclosure of the mortgage indentures, a period of approximately six years. It would clearly be in the best interests of the New Haven estate and its creditors.

15. The likelihood that the Commission will require simultaneous inclusion of the New Haven as a condition precedent to consummation of the Penn-Central merger would be vastly enhanced if it were sought by the New Haven Trustees, along with the creditors and the States affected. It is moreover essential that the details of such inclusion, whether by lease at a nominal rental, or by an interim transfer of properties subject to existing liens, be worked out by the Trustees, their counsel, and the staff of the New Haven.

16. Sections 11.7 and 30.4 of the April 16 "Agreement" clearly prevent the Trustees from seeking any improvement in price and terms of the ultimate sale of properties for the benefit of the estate, and may hamper the Trustees in seeking immediate inclusion of the New Haven operations at the time of and as a condition precedent to the Penn-Central merger. It is essential, therefore, that the Trustees be instructed that those provisions are of no force and effect and should be disaffirmed, and that the

written by counsel for Gruss to Joseph Auerbach, Esq., counsel for the Trustees, on March 10, 1966, urging that the Trustees not undertake such conflicting obligations to Penn and Central.

7. The conflict of interest was manifest in the hearings before the Commission during the first five months of 1967. Throughout those hearings, the Trustees sought to persuade the Commission not to improve the price that the New Haven estate would receive for its properties from Penn and Central. Counsel for the Trustees conducted hostile and aggressive cross-examination of witnesses presented by the creditors, whose testimony would support an improved price for the estate. In their brief and argument before the Commission, counsel for the Trustees sought to discredit such evidence submitted in the best interests of the New Haven estate.

8. As a result of their commitments to Penn and Central the Trustees abandoned their position that the Commission should require inclusion of the New Haven at the time of and as a condition precedent to the Penn-Central merger. Despite their best efforts to advance consummation of the Penn-Central merger, without inclusion of the New Haven until some indefinite time in the future, the merger was delayed at least until August 1, 1967, as a result of the decision of the Supreme Court of the United States in *Baltimore & Ohio R. Co.* vs. *United States*, *U. S.* , 35 U. S. Law Week 4271 (March 27, 1967). Pursuant to a Supplemental Report and Order of the Commission served on June 12, 1967, Penn and Central are now authorized to consummate their merger on July 17, 1967, and have indicated their intention to consummate, if not enjoined, on August 1, 1967.

9. A Petition of Gruss filed with the Commission on July 11, 1966, asking the Commission to modify its Order dated April 6, 1966, to require inclusion of the New Haven at the time of and as a condition precedent to the Penn-Central merger, was denied by the Commission. A proceeding brought by Gruss to review that action of the Commission was dismissed by the United States District Court for the Southern District of New York. *Oscar*

Appendix D

Gruss & Son vs. *United States,* 261 F. Supp. 386 (November 28, 1966). Gruss appealed to the Supreme Court of the United States, and on May 8, 1966, the Supreme Court vacated the Order of the District Court and remanded the case to the District Court for further proceedings in conformity with the Supreme Court opinion. After citing *Baltimore & Ohio R. Co.* vs. *United States, supra,* the Supreme Court opinion states:

> "Since the order which appellant's suit attacked is now subject to further consideration by the Commission and since proceedings to achieve inclusion of the New Haven are also under way before the Commission, it appears inappropriate to review the decision of the District Court at this time. Rather, we vacate the Order of the District Court and remand the case to that court. Should appellant still be dissatisfied with the ultimate order of the Commission in the merger proceedings, it may attempt a fresh challenge in the District Court."

The Mandate of the Supreme Court was docketed in the District Court on June 7, 1967. A proposed order of the District Court on the Mandate of the Supreme Court has been noticed for settlement on June 20, 1967.

10. When the petition of the Trustees for instructions was filed, appeals from this Court's Order No. 404 were pending in the United States Court of Appeals for the Second Circuit. In an Opinion dated May 29, 1967, Order No. 404 was modified to eliminate the provisions opposed by the appellants, all representing bondholders of the New Haven.* The opinion states:

> "At the very best the time-table envisioned by the Trustees in September, 1966, * * * has been thrown badly out of kilter. The Commission may well decide that * * * prudence alone would dictate the formulation of a more nearly conven-

---

*The appellants were Gruss; The Chase Manhattan Bank (N.A.), as Trustee under the Debtor's General Income Mortgage; and the Committee for the Holders of the Debtor's First and Refunding Mortgage Bonds.

Appendix D

Trustees be directed to act on behalf of the estate free of any conflicting obligations to Penn and Central.

Respectfully submitted,
OSCAR GRUSS & SON
By: MYRON S. ISAACS
Counsel
475 Fifth Avenue
New York, N. Y. 10017

June 19, 1967.

EXHIBIT A

March 10, 1966

Joseph Auerbach, Esq.
Sullivan & Worcester
185 Devonshire Street
Boston, Massachusetts 02110

Dear Mr. Auerbach:

As you know, I was very much disturbed at the statements you made, in the conferences held on Tuesday at the offices of Simpson, Thacher & Bartlett and in Judge Anderson's chambers, concerning the consideration to be paid by Penn-Central for the business and assets to be acquired from the New Haven.

Your statement that the Trustees believe that they have negotiated a fair and adequate price is not what disturbs me, although I am inclined to believe that some improvement can and should be obtained. Differences of judgment on matters like this are normal, and I would readily concede that the Trustees are far better informed than I, and that their judgment may be correct.

However, you went much further, and said that even if the Trustees on the basis of a more complete record were convinced that a better price should and can be obtained, they are now in the process of signing an agreement that will tie their hands and prevent their assisting the New Haven to take advantage of the

situation. Indeed you said that if it appears, by reason of additional information or changed circumstances, that a better price is obtainable and should be obtained, then the Trustees might have to resign.

It seems to me that the Trustees cannot properly put themselves and the railroad in such a position. Their fiduciary obligation to represent the estate and the security holders is not one that can properly be bargained away. Their undoubted right to negotiate for a sale of the railroad property that they deem advantageous is limited by the requirement that any such agreement be subject to the approval of the Court that appointed them. The Court, as well as the security holders, are entitled to the independent judgment of the Trustees on the matters to be considered from time to time, untainted by any conflicting obligation to other contracting parties.

I am not asking you now to accept the judgment of bondholders' representatives as to the value of the New Haven properties. I am asking you to see that sufficient openness of mind and independence is retained so that bondholders, other security holders, and the Court will not be deprived of the Trustees' services if it should for any reason appear that the arrangement with Penn-Central can and should be improved.

I have discussed the matter now with my clients and they too feel that this matter should be brought formally to the attention of the Trustees.

Very truly yours
MYRON S. ISAACS

MSIRG

cc. James William Moore, Esq.
Robert W. Blanchette, Esq.
Horace J. McAfee, Esq.
Lloyd V. Almirall, Esq.
Joseph Schreiber, Esq.